Office-Supreme Court, U.S.
FILED
AUG 23 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 470

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and GEORGE LEONIDAS,
Petitioners,

vs.

NATIONAL MEDIATION BOARD and LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board, HOWARD G. GAMSER and FRANCIS A. O'NEILL, JR., Individually and as Members of the National Mediation Board, and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 31, 1966. The order of the United States District Court for the District of Columbia granting respondents' motion for summary judgment and denying petitioners' motion for summary judgment is printed in R. 217. The opinion of the court below is printed in Appendix A, *infra*, page 17 of this Petition.

JURISDICTION.

The Opinion of the court below was entered May 31, 1966 and judgment was entered on the same day. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

In an election conducted by the National Mediation Board, in which more than 35,000 employees of a single employer were entitled to choose between petitioner union and another labor organization as their collective bargaining representative, did the Board deprive petitioners of their rights of freedom of speech and assembly and due process of law guaranteed by the First and Fifth Amendments to the Constitution by denying to petitioner union sufficient time and opportunity to communicate effectively with the employees entitled to vote in the election?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution which are involved are the First and Fifth Amendments. The statutory provisions involved are Section 2, Fourth of the Railway Labor Act as amended. 45 U. S. C., § 152, and Section 2, Ninth of the Railway Labor Act, as amended, 45 U. S. C., § 152. These provisions are printed in Appendix B, page 20 of this Petition.

STATEMENT.

A. Facts.

Since approximately 1915 petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an international labor organization, hereinafter referred to as "IBT", has represented,

for the purposes of collective bargaining, drivers, helpers and garagemen employed by the Railway Express Agency, Inc., hereinafter referred to as "REA", in eight major cities in the United States; namely, Cincinnati, Ohio; Cleveland, Ohio; Newark, New Jersey; New York, New York; Philadelphia, Pennsylvania; St. Louis, Missouri; San Francisco, California and Chicago, Illinois. For a similar period of time, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, an international labor organization, hereinafter referred to as "BRC", intervenor-respondent herein, has represented all other employees of REA in the United States with the exception of one group of approximately 650 employees which is not involved in the instant case. As of early 1965 approximately 3200 employees of REA were represented by, and held membership in the IBT (R. 6-7, 147-148), while the BRC represented approximately 32,000 such employees (R. 82-83, 135, 148).

The right to represent various categories of employees of REA had been a subject of considerable controversy between the IBT and BRC during the early years of their status as bargaining representatives of employees of REA. However, in the early part of 1937 the disagreements between the IBT and the BRC over their jurisdictional rights of representation at REA were submitted to the respondent National Mediation Board, pursuant to Section 5, First, of the Railway Labor Act, 45 U. S. C. § 155, First. As a result of the Board's conciliation efforts, on June 10, 1937, the IBT, BRC, and REA entered into a formal agreement which resolved the disputes and settled the respective jurisdictional claims of the two unions (R. 7-8, 44-46, 83).

Basically, the mediation agreement provided that the IBT would represent the following employees:

> Chauffeurs and helpers, stablemen and garagemen who are now represented by the International

> Brotherhood of Teamsters, Chauffeurs, Stablemen[1] and Helpers of America in the following cities: Cincinnati, Ohio; Cleveland, Ohio; Newark, N. J.; New York, N. Y.; Philadelphia, Pa.; St. Louis, Mo.; San Francisco, Calif.; Chicago, Ill.; and in any other city in which a majority of chauffeurs and helpers, stablemen and garagemen may hold membership in the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America.

The agreement provided further that the BRC would represent all other employees of REA with a few additional exceptions (R. 8, 18-20, 83-84, 135, 148-149). The mediation agreement was incorporated as an express provision in the respective collective bargaining agreements negotiated by the IBT and REA and by the BRC and REA, and has remained a part of such agreements until the present (R. 8-9, 84, 135, 149-150).

On March 23, 1965, notwithstanding the existence of the mediation agreement, the BRC filed an application with the National Mediation Board, pursuant to Section 2, Ninth, of the Railway Labor Act, 45 U. S. C., § 152, Ninth, requesting certification of the BRC as the representative of a craft or class of clerical, office, station and storehouse employees, consisting of all employees of REA, including the 3200 employees represented by the IBT at the time of the filing of the application. The BRC application was docketed by the Board as Case No. R-3750 (R. 9-10, 21-29, 86, 135-136, 140, 151).

Subsequent to the filing of the BRC's application, the IBT raised various objections before the Board to the processing of the application, including the existence of the mediation agreement of 1937 as a bar to the filing of the BRC application (R. 11, 34, 40, 67), the forty year

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[1] On September 12, 1940, the designation "Stablemen" in the title of the IBT was changed to "Warehousemen."

history of bargaining as establishing two separate classes of employees appropriate for collective bargaining at REA (R. 33, 40, 57-65), as well as the desire of the employees of REA represented by the IBT to continue to be represented by the IBT as a separate craft or class (R. 10). In the alternative, the IBT contended that if the Board were to direct an election on a system-wide basis it should be limited to a craft or class of chauffeurs, helpers and garagemen, rather than the unit sought by the BRC (R. 39-40).

On September 8, 1965, the Mediation Board issued its "Findings Upon Investigation" in which it rejected all IBT contentions, established a single company-wide craft or class of "Clerical, Office, Station and Storehouse Employees of REA Express, Inc." and directed an election among all these employees. However, no specific date was announced by the Board for the conduct of the election at that time (R. 12, 30-72, 87-88, 136, 141-142, 151).

On September 24, 1965, the IBT filed a motion with the Mediation Board requesting that following receipt from the Board of a list containing the names and addresses of the employees eligible to vote in the election, the parties be permitted a minimum of ninety days prior to the date on which the election would be held in which to campaign among the employees and engage in electioneering activities. The IBT's motion was denied by the Board on October 8, 1965 (R. 13, 72-73, 142, 152, 208-209).

On or about October 8, 1965, a representative of the Mediation Board informed the parties that the election would be held no later than November 4, 1965, and perhaps sooner. A representative of the Board also informed the parties that on or about October 15, 1965, in accordance with the past established practice of the Board, the parties would be supplied with a list containing the names and addresses of the employees eligible to participate in the election (R. 151-152, 159-160).

On Friday, October 15, 1965, the Board, through its mediator, William H. Pierce, delivered to the parties a list of approximately 34,000 names and addresses of purportedly eligible employees of REA, which previously had been supplied to the Board by REA. The list purportedly included the names and addresses of all eligible REA employees who were employed at the company's approximately 8,000 places of business throughout the United States. In addition, the list purportedly included the names and addresses of approximately 4,000 employees who were on furlough or on disability retirement, but who, pursuant to the Board's rules and regulations, were eligible to participate in the election. Members of the latter group were not working at any of the company's places of business at the time of the election (R. 143, 152, 159-160).

On October 22, 1965, Mediator Pierce advised the IBT that the names and addresses of approximately 900 eligible employees had been omitted from the original list and he made these previously omitted names and addresses available to the IBT on that date (R. 153, 161).

On approximately October 19, 1965, the IBT began to mail campaign literature to employees of REA on the basis of the addresses it had been supplied by Mediator Pierce on October 15, 1965. From October 19 to October 31, 1965, IBT campaign literature which had been mailed to approximately 1600 listed employees was returned by the post office as being undeliverable. The IBT delivered the returned envelopes to Mediator Pierce for the purpose of obtaining correct names and addresses from REA so that the IBT might have an opportunity to communicate with these employees by mail before they received their ballots. As of October 29, 1965, the IBT had not received the corrected names and addresses of these 1600 employees from Mediator Pierce (R. 153-154, 161).

On October 28, 1965, Mediator Pierce notified the IBT that REA had omitted from the list an additional 1100 names and addresses of eligible employees, and he delivered this second supplemental list to the IBT on that date (R. 154, 161-162).

In the course of campaigning, representatives of the IBT reported that they had encountered numerous employees of REA whose names did not appear on any of the foregoing lists. In addition, they came across persons who were normally retired from the service of REA and who were not disabled, whose names appeared on the list of eligible employees even though they were not eligible to vote under the existing rules of the National Mediation Board (R. 154, 162).

On the basis of the foregoing, the IBT protested to Mediator Pierce that it had not had an effective opportunity to verify the lists which he had supplied, that the lists contained gross inaccuracies and that the IBT had been denied an adequate opportunity to campaign effectively in light of the discrepancies and shortcomings of the lists and the short time period allowed for campaigning. In response, Mediator Pierce advised the IBT that he was acting upon the instructions of the National Mediation Board and was without discretion to postpone the mailing of ballots to the listed employees (R. 154, 162).

On October 31, 1965, Mediator Pierce began to mail ballots to the employees. The ballots were returnable immediately but not later than 10 a. m., December 1, 1965 (R. 154).

On December 1, 1965, Mediator Pierce began the tally of returned ballots. He completed his count on December 5, 1965. The results of the election were as follows:

Employees eligible to vote	35,560
Voting for BRC	17,867
Voting for IBT	10,192
Void ballots	261

(R. 165)

On December 10, 1965, the NMB issued its certification to the BRC (R. 158, 166, 181, 212).

B. Court Proceedings.

Petitioners, the IBT and George Leonidas, an employee of REA and an IBT representative, filed their complaint in the District Court for the District of Columbia in this proceeding on October 13, 1965, together with a motion for preliminary injunction seeking a stay of the election *pendente lite*. The complaint alleged, *inter alia*, that the Board acted arbitrarily and beyond its power in directing an election on a systemwide basis contrary to a pattern of bargaining that had been established for forty years and formalized in existing agreements, and the stay was sought on the foregoing grounds plus the contention that the Board had acted unconstitutionally in denying petitioners sufficient time in which to communicate with REA employees for election purposes. Upon motion and consent order filed October 18, 1965, the BRC was permitted to intervene as a party defendant (R. 74-80). On October 25, 1965, the District Court denied the motion for preliminary injunction (R. 144). Petitioners appealed to the Court of Appeals for the District of Columbia Circuit from that denial and filed a motion for a stay of the election pending appeal. On October 29, 1965, that Court denied the motion for stay, Judge Wright dissenting. The Order and Opinion of that Court denying the motion for stay is attached hereto as "Appendix C". Application to this Court for stay was denied by Chief Justice Warren on October 30, 1965.

On October 19, 1965, the BRC filed a motion to dismiss petitioners' complaint or for summary judgment (R. 109).

Petitioners filed a cross-motion for summary judgment on December 21, 1965 (R. 145). Respondents filed their opposition to petitioners' cross-motion for summary judgment as well as their own motion to dismiss or for summary judgment on January 10, 1966 (R. 207). The BRC filed its opposition to petitioners' cross-motion for summary judgment on January 10, 1966 (R. 184). On January 18, 1966, Petitioners answered the motions to dismiss or for summary judgment filed by both the respondents (R. 215).

After hearing argument on the foregoing motions, Judge Oliver Gasch issued an Order, signed February 4, 1966, and filed February 7, 1966, granting the motions for summary judgment of the respondents and denying the motion for summary judgment of the petitioners (R. 217).

The case was duly appealed to the United States Court of Appeals for the District of Columbia Circuit and on May 31, 1966 that Court issued its decision and judgment affirming such order. The Court disposed of petitioners' contentions on the ground that judicial review of National Mediation Board proceedings is limited and concluded that

> "The proceedings were pending for some months and we cannot say on the record before us that the Teamsters were so severely deprived of campaign opportunities—matters largely intangible—that we are required to hold, contrary to the judgment of the Board, that constitutionally protected rights were infringed."

The decision is attached hereto as Appendix "A".

REASONS FOR GRANTING WRIT.

This case presents a question of importance in the administration of the Railway Labor Act. Under that Act the National Mediation Board, pursuant to its established

policy, conducts representation elections solely on a systemwide or a companywide unit basis in which thousands of employees are or may be involved, and who may be employed in many places of employment throughout the country. The Board has no rules or standards under which unions involved in such elections are given an opportunity to campaign.[2]

There has been no definitive expression by this Court or any court, other than the perfunctory opinion of the Court of Appeals in the instant case, setting forth the nature and extent of the constitutional rights of the unions and employees involved in such systemwide elections to communicate with other employees in the course of an election campaign, or concerning the extent to which the National Mediation Board or other administrative agencies, exercising the function of resolving disputes over representation, may restrict or limit effective exercise of this right to communicate with employees concerning the benefits or advantages of choosing one rather than another union as a bargaining representative.

The instant case, involving as it does some 35,000 employees employed by the country's largest express company in some 8,000 locations throughout the United States,

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[2] While the Railway Labor Act (Section 2, Ninth) requires that the Board certify to the parties involved in the election within 30 days of the invocation of its services the name of the organization that has been designated to represent the employees involved, it is well settled that this 30-day provision is "directory rather than mandatory." System Federation No. 40 v. Virginia Ry. Co., 11 F. Supp. 621 (D. C. Va. 1935), affirmed, 84 F. 2d 641 (C. A. 4), affirmed, 300 U. S. 515. The Board has acknowledged that the 30-day proviso is only directory. See National Mediation Board, **Administration of the Railway Labor Act by the National Mediation Board,** 1934-1957, p. 49 (1958). As a matter of practice it can be demonstrated that frequently the time lapse very substantially exceeds the 30-day interval provided in the statute as well as the 262-day period which elapsed in the instant proceedings.

is of national significance. The case brings into issue the right of communication of each of such employees as well as the right of the labor organizations that seek to represent them. Decision by this Court will serve not only to correct what the petitioners contend is a grave abuse of such rights but will also serve to establish guidelines for proper recognition of such rights in future elections which may be conducted by the National Mediation Board or similar administrative bodies.

In the courts below it was acknowledged that labor unions as well as employees involved in disputes over representation have a constitutional right to communicate with other employees in order to persuade them to select a particular union as their collective bargaining representative. **Staub v. City of Baxley**, 355 U. S. 313 (1958); **Thomas v. Collins**, 323 U. S. 516 (1945). Concomitant is the equally undeniable proposition that this right necessarily must be permitted to be exercised in an **effective** and practical manner. In **Thornhill v. Alabama**, 310 U. S. 88 (1940), an "anti-picketing" statute was struck down precisely because its prohibition embraced "nearly every **practicable, effective means** whereby those interested—including the employees directly affected—may enlighten the public on the nature and cause of a labor dispute," 310 U. S. 88, 104. (Emphasis supplied.) Neither a state nor the Federal Government "may impair the **effective** exercise of the right to **discuss freely** industrial relations which are matters of public concern." 310 U. S. 88, 104. (Emphasis supplied.)

It is well recognized by experts and students in the field that to be effective a large scale election campaign cannot be severely limited as to time or media of communications. The use of letters, leaflets, speeches, radio and television and, above all, personal contacts, in varying combinations and degrees, as by house to house visits and the holding of meetings, is essential in an election

contest of the magnitude and geographic dispersion such as the one involved herein.[3]

In the instant case petitioner union and the individual employees who wished to give their support were given no effective opportunity to persuade the employees involved in the election to choose IBT rather than BRC as their collective bargaining representative. The 35,000 employees who must be reached were scattered throughout the country in 8,000 different places of employment, in 85% of which less than 25 employees were employed. For about 40 years BRC had close contact with 32,000 of them; petitioner union had contact with only 3,200 for the same period. Under its union shop agreement and the mailing lists under which it distributed its periodicals, the BRC had a substantial initial advantage in the election which the Board failed to take into account—as it could have by affording IBT at least a reasonable time in which to communicate with the 32,000 employees with whom it had no previous contact. The National Mediation Board announced the date of the election only three weeks before it was to be held and provided its customary mailing list to the unions involved only 15 days before the election.

In view of the number of employees involved and their scattered places of employment, the importance of mailing lists is obvious. Vital as opportunity for personal communication through home visits or the holding of meetings is, at the very least opportunity should have been afforded for dissemination of campaign literature by mail as the only practical means of reaching the em-

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[3] See, **S & H Grossinger's Inc.**, 156 NLRB No. 20, 61 LRRM 1025, 1028-29. See, also, Eldersveld and Dodge, **"Personal Contact or Mail Propaganda: an Experiment in Voting and Attitude Change"**, in Katz, **Public Opinion and Propaganda**, 532, 541 (1954); Karsh, **Diary of a Strike**, 106 (1958); Klapper, **The Effects of Mass Media**, pt. 2, pp. 9-14 (1949).

ployees in the limited time given if the right of communication is to be other than an empty gesture, particularly where some 4,000 of the employees involved were furloughed, disabled or retired employees who could be reached only at their home addresses.[4]

Even the original mailing list furnished by the Board was grossly inadequate, as shown by the fact that by October 31, 1965, 1600 letters sent by petitioner union in reliance on the original lists were returned as "undeliverable" and by the fact that the Board was obliged to provide an additional list of 900 names and addresses eight days before the election and a list of 1100 more only two days before the election.

On the undisputed facts petitioner union had only two days to reach, even by mail, 1100 employees, only eight days to reach 900 employees, and no opportunity to reach the 1200 employees whose addresses were incorrect. Opportunity to make home visits and to hold meetings, the most important aspect of any election campaign (see footnote 3), was negligible.

Petitioners are not suggesting that the Constitution requires the Board to afford the IBT sufficient time in which to visit the homes of each of the 35,000 employees involved. What constitutes free expression on the one hand, or reasonable restraint on the other, must depend on the facts of each case. Petitioners submit, however,

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[4] It is no answer to say that petitioners had since March 23, 1965, when the BRC filed its petition for an election, in which to campaign. Serious issues as to whether any election would be conducted had been raised, including the 40-year prior history of bargaining and the existence of the current agreement between the unions and the company allocating respective representation rights. Certainly petitioners cannot be required to assume that they would be forced into an election and thus be put under obligation to commence their campaigning prior to the time the Board announced whether or not an election would be held.

that the form and degree of "discussion" permitted in this case cannot be deemed "practicable," "effective," or "free."

The court below bowed to the judgment of the Board that constitutionally protected rights were not infringed, relying on **Switchmen's Union v. National Mediation Board**, 320 U. S. 297; **Railway Clerks v. Employees Ass'n.**, 380 U. S. 650; and **Flight Engineers' International Assn. v. National Mediation Board**, 119 U. S. App. D. C. 171, 338 F. 2d 280, which affirm the broad scope of Board power in administering the Railway Labor Act. But administrative discretion, however broad, is not unbridled where constitutional rights are involved. **Kent v. Dulles**, 357 U. S. 116, at 129; **Greene v. McElroy**, 360 U. S. 474, at 507.

It is not controverted, as indeed it cannot be in the realities of modern industrial relationships, that unions and their supporters have a constitutional right protected by the First and Fifth Amendments to attempt through all available media of communications, and in a practical and effective manner to persuade employees involved in a contest over rights of representation to select one rather than another labor organization as their bargaining representative. Such right of communication simply was not afforded petitioners in the instant case, with the result, noted by Judge Wright dissenting from the opinion of the court below denying application for stay, that "the outcome of the election [was] a foregone conclusion." Whatever discretion the National Mediation Board may have in administering the Act, it had no discretion to deny or curtail the exercise of constitutional rights. Unless this Court intervenes, this or another administrative body whose function it is to resolve representation disputes may well deprive participants in a union election of the right to inform and to be informed concerning the issues and the merits of the respective candidates. Assuredly the Con-

stitution requires that effective opportunity for enlightment in an area as important to the national economy as choice of bargaining representative not be denied by governmental agencies charged with the responsibility of determining that choice.

CONCLUSION.

For the reasons stated, this petition should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the District of Columbia Circuit.

No. 20027.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Appellants,

v.

National Mediation Board, et al., Appellees.

Appeal from the United States District Court for the District of Columbia.

Decided May 31, 1966.

Mr. Herbert S. Thatcher, with whom **Messrs. David Previant, David S. Barr** and **Jules Bernstein** were on the brief, for appellants.

Mr. John C. Eldridge, Attorney, Department of Justice, with whom **Assistant Attorney General Douglas** and **Mr. Morton Hollander**, Attorney, Department of Justice, were on the brief, for appellee, National Mediation Board.

Mr. James L. Highsaw, Jr., with whom **Mr. Edward J. Hickey, Jr.**, was on the brief, for appellee, Brotherhood of Railway and Steamship Clerks.

Before Wilbur K. Miller, **Senior Circuit Judge**, and **Fahy and Tamm**, Circuit Judges.

Per Curiam: The appeal is from an order of the District Court granting the motion of the National Mediation Board for summary judgment on a suit brought against the Board by the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, here the Teamsters, and George Leonidas, appellants. They sued to prevent the holding of an election, under the Railway Labor Act, of a collective bargaining agent among employees of REA Express, Inc. The District Court denied preliminary injunctive relief sought by appellants. This court and thereafter the Chief Justice of the United States declined to stay the action of the District Court or to enjoin the election or certification. In due course the case has reached this court for decision on the merits after the election was held and the Brotherhood of Railway Clerks, the Teamsters' rival labor organization in the election, was certified as the representative of the employees.

The contention of appellants is that the manner in which the Board scheduled the election deprived the Teamsters of an adequate opportunity effectively to campaign among the employees, especially as the collective bargaining unit fixed by the Board embraced a large number of employees theretofore represented by the Railway Clerks and among whom previous organizing efforts had not been made on behalf of the Teamsters. It is accordingly urged that the Teamsters were deprived of their constitutional rights protected, primarily, by the First Amendment. The contention is sought to be supported by allegations not only of insufficient time to reach the employees in general but by faulty addresses furnished by the Board for some of the employees.

Appellants are faced with the well-established limitations upon judicial review of employee representation proceedings conducted by the Board under the Railway Labor Act. See **Switchmen's Union v. National Mediation Board**, 320 U. S. 297; **Railway Clerks v. Employees Ass'n**, 330 U. S. 650; **Flight Engineers' International Ass'n v. National Mediation Board**, 119 U. S. App. D. C. 171, 338 F. 2d 280.

To sustain the constitutional challenge the burden of demonstration is a heavy one.

The proceedings were pending for some months and we cannot say on the record before us that the Teamsters were so severely deprived of campaign opportunities—matters largely intangible—that we are required to hold, contrary to the judgment of the Board, that constitutionally protected rights were infringed.

Affirmed.

APPENDIX B.

United States Constitution:

First Amendment:

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Railway Labor Act, U. S. Code, Title 45, Chapter 8:

Section 2, Fourth:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall

treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

APPENDIX C.

United States Court of Appeals for the
District of Columbia Circuit,
September Term, 1965.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., Appellants,

v.

National Mediation Board, et al., Appellees.

No. 19,737.

Before: Fahy, Danaher, and Wright, Circuit Judges.

ORDER.

(Filed Oct. 29, 1965.)

The above-entitled case came on for hearing on appellants' motion for injunction and stay pending appeal and pending decision on the merits below, and said motion was argued by counsel. On consideration whereof, and without intimating a view as to the validity of the election, it is

Ordered by the court that the aforesaid motion is denied.

Per Curiam,
C. F., J. A. W.

Dated:

Fahy and Danaher, **Circuit Judges**: If the constitutional contention of appellants attacking the validity of the election has merit this nevertheless does not furnish a basis for this court at this time to use its extraordinary power to enjoin the Board as requested; for the constitutional contention will not be lost should the court's equitable power not be exercised at this time.

C. F., J. A. W.

Wright, **Circuit Judge**, dissenting: For forty years, by agreement between the two unions, the Teamsters Union has represented some of the drivers of the Railway Express Agency and the Railway Clerks Union has represented the balance of the employees. On September 8, 1965, after proceedings before the National Mediation Board, the Board determined that all of the employees of REA were a proper bargaining unit and called an election to be held "in the near future" to determine who should represent the unit.

On September 28, 1965, the Teamsters Union asked the Board for ninety days for electioneering between the delivery to the parties of the names of the eligible voters and the election. On October 8, 1965, the Board denied this request. About the 13th or 14th of October, 1965, the unions were orally advised by the Board mediator that the election would be held by mail and the ballots would be sent out around November 1, 1965. On October 15 the Board gave the unions a list of the names and addresses of some 34,000 persons, purportedly all the employees eligible to vote. On October 22 this list was supplemented with 900 additional names, and yesterday, on October 28, the Board added 600 more names. In the meantime, some 500 letters containing election information addressed by the Teamsters to the eligible voters at the addresses shown on the list furnished by the Board have been returned as undeliverable.

The District Court denied the Teamsters' application for an injunction against the election and other relief, and the case is before this court on application for a stay of the election pending appeal.

The actions of the Board are subject to judicial review only where the Board has acted unconstitutionally, see **Switchmen's Union v. National Mediation Board**, 320 U. S. 297, 301 (1943), or outside its statutory authority, **Leedom v. Kyne**, 358 U. S. 184 (1958). The Teamsters

Union claims, citing, *e. g.*, **Staub v. City of Baxley**, 355 U. S. 313 (1958); **Thomas v. Collins**, 323 U. S. 516 (1945); **Thornhill v. Alabama**, 310 U. S. 88 (1940), that it has been effectively denied its First Amendment right to solicit votes from the employees eligible to vote in the forthcoming election by the time schedule which the Board has set. It particularly urges the fact that it is impossible to obtain a complete and accurate list of the employees eligible to vote by the time the ballots will be sent out and that it will have no real opportunity to contact these employees, scattered as they are throughout the country, by mail or otherwise, and that the employees, consequently, will be unable to make an informed choice. Since the Railway Clerks Union has represented the great majority (32,000 of 35,000) of the employees of the Railway Express Agency over the years, the peremptory action on the part of the Board, according to the Teamsters, not only gives the Railway Clerks an unfair advantage in the electioneering, but makes the outcome of the election a foregone conclusion.

Without attempting to decide the issues presented on appeal on this application for a stay, it appears to me that the Board's action in calling an election without indicating the date until two weeks before the ballots were to be sent out, and then supplying the parties to the election with an incomplete and inaccurate list of employees eligible to vote, presents a substantial constitutional question involving the First Amendment. Under the circumstances, it would be appropriate for this court to stay the election and expedite this appeal. At the very least, the court should order the ballots impounded until the validity of the election has been determined. Without such relief, REA Teamster locals in the various cities may be unnecessarily destroyed and their pension funds adversely affected before this litigation is concluded.

J. A. W.

SUPREME COURT, U. S.

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No. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and GEORGE LEONIDAS, *Petitioners,*

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents,* and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS IN OPPOSITION

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September, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court (R. 217) was entered on February 7, 1966, and is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Appendix A of Petition) was entered on May 31, 1966, and is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Did the National Mediation Board violate any requirements of the First and Fifth Amendments to the United States Constitution in denying the motion of petitioners to delay a representation election among employees of REA Express for a period of not less than 90 days after preparation of a list of eligible employees in order that petitioners could conduct an election campaign during such period in circumstances where (a) the representation application involved had been before the Board for some seven months, (b) the petitioners had two months' notice of the representation election and approximately six weeks' notice of the actual date, and (c) the applicable statute provides that the Board shall certify a representative within 30 days of receipt of a representation application?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the First and Fifth Amendments to the United States Constitution and of Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth) involved are set forth in Appendix B of the Petition.

STATEMENT

The litigation concerns a representation election conducted by the National Mediation Board on the property of REA Express pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth). The representation

election grew out of an application filed with the National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (BRC) on March 23, 1965, pursuant to the cited provision of the Railway Labor Act, requesting the Mediation Board to certify the BRC as the duly designated representative of the employees of REA Express, with the exception of those employees represented by the International Association of Machinists (R. 9, 10, 21-29). At the time the application was filed, there was no certification of a representative for any of the employees of REA Express (R. 8, 150). Such representation had existed for a substantial period of time prior thereto pursuant to voluntary recognition by REA Express of the BRC, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT), and the IAM as representatives of various groups of the carrier's employees. In accordance with such voluntary recognition, the BRC represented all of the employees of REA Express with the exception of those vehicle employees located in eight cities and the carrier's mechanics; IBT represented vehicle employees in those eight cities; and the IAM represented mechanics and related employees (R. 6-8). The BRC representation consisted of 29,844 employees of REA Express; the IBT representation consisted of 3222 employees; the IAM representation consisted of 650 employees (R. 6, 62).[1]

This pattern of voluntary split recognition had produced a great deal of dissention over the years to the

[1] BRC represented 7211 vehicle employees, or about 70% of the carrier's employees in such category (R. 62, 63).

detriment of everybody concerned, including the carrier (R. 111-133, 135, 139). BRC therefore finally decided that the public interest required a single representative for all but the small group of mechanics chosen in accordance with the orderly procedures of Section 2, Ninth, of the Railway Labor Act, and accordingly filed its representation application for that purpose (R. 131-133).

Section 2, Ninth, provides, *inter alia,* that the Mediation Board shall investigate a representation dispute and certify the designated and authorized representative of employees involved within 30 days after the invocation of its services. The Federal courts have ruled that this provision is directory rather than mandatory. *System Federation No. 40, Etc.* v. *Virginian Ry. Co.,* 11 F. Supp. 621, 627, aff'd 84 F. 2d 641 (4th Cir.), 300 U.S. 515. The Mediation Board, in accordance with this interpretation, has followed a practice of investigating and resolving representation disputes as promptly as practicable, in the interest of promoting stable labor relations in the transport industries subject to the Railway Labor Act. (See: *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957,* pages 48-49.)

In the present dispute, the IBT filed with the Mediation Board various objections to the BRC application and requested a hearing thereon (R. 33-39). The principal objections of IBT were (1) a claim that the BRC application was barred by a 1937 mediation agreement between BRC, IBT, and REA Express, and (2) a claim that the vehicle employees of REA Express should be set apart as a separate craft or class for representation purposes (R. 30-42). The Mediation

Board held a full public hearing on the IBT objections and on September 8, 1965, issued its determinations, in which it rejected the IBT contentions and directed that a representation election be held in the near future among the employees of REA Express involved (R. 30-72, 136, 137).[2]

In accordance with this procedure, the Mediator assigned by the Board met with the representatives of BRC and IBT on September 21, 1965 (R. 142), to discuss the procedures for the holding of an election, including the status of certain employees left open in the Board's findings of September 8, 1965,[3] the cut-off date for eligibility, an eligibility list, and the type of election, i.e. by mail ballot or by ballot box (R. 200).

On September 23, 1965, the Mediator advised the parties that the list of eligible employees (i.e. those in the occupations established by the Board's determinations as shown by the carrier's records) would be ready on or about October 12, 1965 (R. 94). Also on that date, the Mediator informed counsel for IBT that the representation election would be conducted by the

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[2] The Board's determinations included a separate opinion on an application by IBT under Section 5, Second of the Railway Labor Act (45 U.S.C.A., Section 155, Second) to interpret the meaning or application of the 1937 mediation agreement (R. 136, 137). In that determination, the Mediation Board found that the 1937 mediation agreement did not, as IBT contended, bar the processing of the BRC application (R. 137).

[3] These were so-called "excepted" employees whom the IBT contended were "officials" and thus not subject to the Railway Labor Act (R. 65, 66). BRC resolved this question by withdrawing its request for their inclusion (R. 188).

Board within 45 days or possibly sooner.[4] Thereafter, on September 24, 1965, the IBT filed a motion with the Mediation Board in the form of a telegram asking that the Board not conduct its election until at least 90 days after the date on which the parties received a list of the employee names and addresses from REA Express (R. 142, 208).[5] This motion was based on a claim that if the representation election were held as scheduled, the IBT would be deprived of constitutional and statutory rights and the eligible employees would be deprived of a right to hear the contestants. This motion was followed by a memorandum in which IBT argued that it had a right of free speech guaranteed by the First Amendment to the United States Constitution and an implied right arising from the Railway Labor Act to engage in a full election campaign (R. 93). On October 8, 1965, the Mediation Board denied the IBT motion in the light of the requirements of Section 2, Ninth, of the Railway Labor Act, the Board's established practices thereunder, and the fact that the parties had been on notice since March 24, 1965, of the pendency of the representation dispute (R. 139, 209). On that date, the Mediator advised the parties that the election would be by mail, that the ballots would be mailed out no later than November 4, 1965, to be returned not later than December 1, 1965 (R. 151, 200).

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[4] Through an inadvertent mix-up in designating exhibits to the complaint, Exhibit G showing that the IBT counsel was so informed was not reproduced in the Joint Appendix before the Court of Appeals. Counsel for IBT agreed that this exhibit could be reproduced in the BRC brief to the Court of Appeals and it was so reproduced as Appendix B thereto. It appears as Appendix A to the present brief.

[5] Appendix A to this brief.

On October 15, 1965, copies of the great bulk of an eligibility list compiled by the carrier were furnished to the parties (R. 153, 200). These lists were not furnished for campaign purposes, but to enable the parties to check eligibility and challenge the validity of votes cast when counted (R. 200).[6]

In the meantime, IBT pursued numerous administrative and legal actions to delay or prevent the holding of a representation election, including the present suit filed on October 13, 1965 (R. 1).[7] Paragraph 24 of the complaint alleged eight errors by the Mediation Board in the processing of the BRC representation application (R. 15, 16). Subparagraph (g) set forth the IBT claim that the Mediation Board had denied IBT rights of free speech and association protected under the First Amendment to the Constitution, which is the subject of the present petition (R. 16).

IBT filed a motion with the District Court for a preliminary injunction to stay the representation elec-

[6] The list then furnished included approximately 34,000 names and addresses of the 35,560 employees of REA Express to whom ballots were sent (R. 152, 157, 200). Subsequently, an additional list was provided (R. 153, 200).

[7] These included a petition to the Interstate Commerce Commission, identified as ICC Ex Parte 72 (R. 47), and representation petitions to the National Labor Relations Board by the local unions of IBT seeking NLRB certification to represent the employees of REA Express involved in the dispute before the Mediation Board (R. 13, 89), which were denied (R. 50, 90). In addition, IBT filed a suit in the District Court on September 17, 1965, against BRC to compel withdrawal of the BRC representation application on the grounds that it violated the 1937 mediation agreement between the parties (Civil Action No. 2305-65). On October 4, 1965, the District Court dismissed the complaint and the Court of Appeals affirmed the dismissal on March 22, 1966 (*International Brotherhood of Teamsters* v. *Brotherhood of Railway and Steamship Clerks*, 358 F. 2d 540).

tion, which was denied by that court on October 25, 1965 (R. 144). IBT appealed such order and requested a stay from the Court of Appeals, which was denied on October 29, 1965 (R. 188). On October 30, 1965, IBT applied for a stay to this Court, which application was denied by Chief Justice Warren on that date (R. 188).

On November 1, 1965, the Mediation Board mailed out to eligible employees of REA Express 35,560 ballots (R. 157, 204, 205). 28,320 ballots were returned to the Mediation Board in custody of the United States Postmaster in New York City by December 1, 1965 (R. 201, 204, 205). These ballots were counted by the Mediator and his assistants in the presence of representatives of BRC and IBT between December 3rd and 5th, 1965, and the Mediator certified the following results: (R. 157, 204, 205)

"Number of employees on list of eligible voters	35,560
Number voting for representation by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America	10,192
Number voting for representation by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO	17,867
Number voting for representation by Other	0
Number of void ballots not allocated to any party	261".

The representatives of BRC and IBT were given full opportunity to challenge the validity of any vote (R. 202). Only 32 ballots were challenged (R. 202).

Although the IBT representative refused to sign the Mediator's certification of results as requested by the Mediator (R. 205), the IBT filed no challenge to the election (R. 206). On December 10, 1965, the Mediation Board certified BRC as the duly designated and authorized representative of the employees of REA Express involved for the purposes of the Railway Labor Act (R. 166, 181-183). Since that date, the BRC has represented the employees of REA Express covered by the certification.

Thereafter, IBT pursued its present action (without amending the complaint to embrace the Mediation Board certification). The Mediation Board and BRC filed similar motions to dismiss the complaint or for summary judgment (R. 109, 110, 207, 208), and IBT filed a cross-motion for summary judgment (R. 145, 146). The District Court granted the motions of the Board and BRC while denying the IBT cross-motion (R. 217).

Before the Court of Appeals, IBT abandoned all of its claims set forth in paragraph 24 of the complaint, except the claim that the Mediation Board's denial of its motion for a stay of the representation election for not less than 90 days after preparation of the eligibility lists violated requirements of the Federal Constitution. In its per curiam opinion affirming the judgment of the District Court (Appendix A of Petition), the Court of Appeals held (1) that, in light of the well established limitations upon judicial review of employee representation proceedings under the Railway

Labor Act, there was a heavy burden upon the IBT to sustain its constitutional challenge, and (2) that the Court could not say on the record before it that the IBT was so severely deprived of campaign opportunities to hold, contrary to the judgment of the Mediation Board, that constitutionally protected rights were infringed.

REASONS FOR DENYING THE PETITION

The petition does not present for the consideration of this Court any important question of Federal law. Nor does the decision below require review because of a conflict with any decision of this Court or of any Court of Appeals. Finally, the decision below is clearly correct.

The petition seeks to raise constitutional issues with respect to the manner in which the National Mediation Board selected an employee representative for employees of REA Express. It clothes the petitioners' disagreement with the Mediation Board's action in constitutional terms in an obvious effort to avoid the impact of the decisions of this Court, which have held that the conduct of representation elections and the choice of employee representatives under the Railway Labor Act have been left by Congress to the final determination of the Mediation Board. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943); *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965). However, the petition does no more than present a disagreement with the judgment of the Mediation Board as to the date upon which a representation election should be held and with the decision of the Court of Appeals that on the

record it could not find that the choice of the Board infringed any constitutional rights. The petition therefore merely raises a question as to the reasonableness of the judgment of the Mediation Board in the situation before that Board with respect to a matter committed by Congress to the Board and the decision of the Court of Appeals not to override that judgment. Such petition does not raise a substantial question of Federal law.

The effort of the petitioners to create a constitutional issue by reference to the decisions in *Staub* v. *City of Baxley,* 355 U.S. 313; *Thomas* v. *Collins,* 323 U.S. 516; and *Thornhill* v. *Alabama,* 310 U.S. 88; is wholly without substance. Those cases involved effort by governmental authority to restrict the free speech of unions or their representatives. In the present case, the Mediation Board did not deny to IBT or anyone else the right to express any views it wished to anyone. It simply scheduled a representation election equally applicable to all concerned and the IBT argument relates solely to the date upon which the election was held. The petitioners' argument is to the effect that the Constitution guaranteed them (1) the right to receive a list of REA Express employees eligible to vote, (2) a period of time thereafter (IBT requested 90 days) to communicate with each such employee by mail or personal visit, and (3) that if it had been granted such privilege the IBT might have persuaded a sufficient number of employees to vote for IBT to reduce the approximate 64% of the vote received by BRC below 50% and to increase the 36% of the vote IBT received to above 50%. This argument involves propositions not heretofore established by any court in the land.

A union has no constitutional right to become a statutory bargaining agent with the privileges attached thereto. This is solely a matter of employee choice pursuant to statute, subject to the conditions which Congress has attached thereto. *McLeod* v. *Local 476, United Brotherhood of Industrial Workers,* 288 F. 2d 198, 201 (2nd Cir., 1961); *Local 1545, United Brotherhood of Carpenters & Joiners* v. *Vincent,* 286 F. 2d 127, 131 (2nd Cir., 1960); *Fay* v. *Douds,* 172 F. 2d 720, 724 (2nd Cir., 1949); *IBT Local 826* v. *Kaynard,* 48 LRRM 2168[8] (D.C. S.D. N.Y., 1961).

Nor do individual employees have any constitutional right to be represented by a union of their choice. *National Maritime Union of America* v. *Herzog,* 78 F. Supp. 148, 154 (D.C. D.C., 1948), aff'd 334 U.S. 854.

It is difficult to perceive how a union, which has no constitutional right to representation under the Railway Labor Act, has a constitutional right to a list of eligible voters and to campaign among those voters. It is equally difficult to perceive how the IBT members, who have no constitutional right to representation or to be represented by a union of their choice, have any constitutional right with respect to the time of an election for such representative.

Moreover, in the *Association for the Benefit of Non-Contract Employees* case, it was argued to this Court that the procedures followed by the Mediation Board in representation elections and the form of ballots used violated constitutional rights both of the carrier and the employees involved (R. 191-196). In rejecting these claims, this Court pointed out that the Railway Labor Act instructs "the Board alone to establish the

[8] Citation reference is to Labor Relations Reference Manual.

rules governing elections" and that, absent a showing that the Board has acted in excess of its statutory authority, there is no basis for judicial review. *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 668, 669. Obviously, the Mediation Board acted within its statutory authority in the present case which, in substance, directs the Board to determine representation disputes within 30 days if possible and in any event as promptly as practicable.

Moreover, any claim that the Mediation Board acted unfairly is without substance. The representation election was not held until more than seven months after the filing of the BRC application. During this period, the IBT knew that there would be a representation election and that such election would at the very least embrace most of the employees involved. The suggestion in the petition (footnote 4, page 13) that IBT did not know there would be an election because it had raised serious issues is refuted by reference to the Board's decisions of September 8, 1965. These show that the questions raised by the IBT before the Board were all either matters with respect to which the Board had long established practices or were wholly without merit and obviously were raised solely for purposes of delay.

No different conclusion may be reached even if the period after the Board's determinations of September 8, 1965, is used as a standard of measurement. As a result of those determinations, it was clear that a representation election would be held and the parties knew the group of employees involved. Such election was not held for two months thereafter. The Board did not prevent the IBT from conducting an election

campaign at any time during this period. Many major political campaigns are conducted during such a period of time.

Even if one looks only at the period of time which elapsed after the IBT was informed by the Mediator as to the date on which the election would begin (September 23, 1965), the IBT had approximately six weeks in which to conduct a campaign. Again, this is a substantial period of time.

The IBT argues that it had a much shorter period because it was not furnished a list of the eligible employees until a later date. It contends that it is constitutionally entitled to a list of eligible employees, a period thereafter in which to verify such list for campaign purposes, and a further lengthy period thereafter to campaign by direct contact with each employee either by mail or by home visits. If this argument were sound, it would never be possible for the Board to comply with the 30-day requirement of Section 2, Ninth, no matter how small the craft or class of employees involved. It would also substantially increase the period of time in which representation disputes remain unsettled under the Railway Labor Act. Moreover, while such lists may be a campaign aid, any union that has been on a property as long as IBT represented some employees of REA Express, should have sufficient familiarity with that property to conduct an effective campaign. In the present case, the IBT obviously was able to conduct such a campaign since it secured the support of more than three times its membership.

The underlying assumption of the IBT claim is that if given more time it might have changed the election

results. This claim is not only pure speculation, but is contrary to political experience. Such experience indicates that a 64% vote for one candidate cannot be changed to a majority for another by additional campaigning. Such additional campaigning could just as easily have increased the BRC majority. A contrary claim hardly forms the basis to upset on constitutional grounds the Mediation Board's resolution of a serious representation dispute and return such dispute to its former chaotic status.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1966

APPENDIX A

1965 SEP 24 PM 2 46
Telex—This message received direct from sender via W. U. Telex

WU TELEX WSH
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TLX PD WASHINGTON DC SEPTEMBER 24, 1965

JAMES L. HIGHSAW JR., ESQUIRE DO NOT PHONE
SUITE 620 TOWER BUILDING
WASHINGTON 5, D. C.

THE FOLLOWING WIRE SENT THIS DATE TO MR. THOMAS A. TRACY, EXECUTIVE SECRETARY, NATIONAL MEDIATION BOARD.

QUOTE—

RE: REA EXPRESS—CASE NO. R-3750

AT THE CONCLUSION OF THE INVESTIGATION IN THE ABOVE MATTER, ON SEPTEMBER 23, 19655, MEDIATOR WILLIAM PIERCE INFORMED THE UNDERSIGNED THAT AN ELECTION WOULD BE CONDUCTED BY THE BOARD WITHIN NO MORE THAN 45 DAYS AND POSSIBLY SOONER. IN LIGHT OF THE FOREGOING, ON BEHALF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE UNDERSIGNER FORMALLY MOVES THAT THE BOARD NOT CONDUCT ITS ELECTION UNTIL AT LEAST 90 DAYS AFTER THE DATE ON WHICH THE PARTIES RECEIVE A LIST OF EMPLOYEE NAMES AND ADDRESSES FROM REA EXPRESS. THIS MOTION IS NECESSITATED BY THE FACT THAT THERE WILL BE APPROXIMATELY 40,000 ELIGIBLE VOTERS IN THE ELECTION AT APPROXIMATELY 8,000 COMPANY LOCATIONS AND THAT APPROXIMATELY 9,000 FURLOUGHED EMPLOYEES WILL BE PERMITTED TO VOTE. SINCE THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS NOW REPRESENTS ONLY APPROXIMATELY 3,500 OF THE COMPANY'S EMPLOYEES IN NINE LARGE CITIES, AND SINCE THE FOURTHCOMING ELECTION WILL TAKE PLACE THROUGHOUT THE UNITED STATES IN LARGE AND SMALL COMMUNITIES, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS MUST BE GIVEN A REASONABLE OPPORTUNITY TO COMMUNICATE WITH AND CAMPAIGN AMONG THE 37,000 ELIGIBLE VOTERS, WHICH IT DOES NOT NOW REPRESENT. FOR THE BOARD TO CONDUCT ONE OF THE LARGEST ELECTIONS EVER HELD, WITHOUT GIVING A PARTY A FULL AND AMPLE OPPORTUNITY TO PRESENT TO THE ELIGIBLE VOTERS THE REASONS FOR CASTING A BALLOT IN ITS FAVOR, WOULD DEPRIVE THE PARTY OF ITS CONSTITUTIONAL AND STATUTORY RIGHTS AND WOULD DEPRIVE THE ELIGIBLE EMPLOYEES OF

THEIR RIGHT TO HEAR THE CONTESTANTS AND MAKE A REASONED CHOICE IN THE ELECTION.

IN LIGHT OF THE FOREGOING, THE UNDERSIGNED RESPECTFULLY REQUESTS THAT ITS MOTION BE GRANTED. THIS REQUEST IS MADE, OF COURSE, WITHOUT PREJUDICE TO ANY POSITION HERETOFORE TAKEN IN THIS CASE BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

AN EARLY DECISION WILL BE GREATLY APPRECIATED.
UNQUOTE.

HERBERT S. THATCHER

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 470

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND GEORGE LEONIDAS, PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS IN OPPOSITION

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1. In March 1965, after many disputes dating from 1937 between petitioner union (the Teamsters) and respondent union—the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (the Railway Clerks)—concerning representation of Railway Express Agency, Inc. (REA) employees, the Railway Clerks requested the National Mediation Board to certify them as the exclusive representative of approximately 36,000 REA employees in a craft or class denominated "Clerical, Office, Station and Storehouse Employees" (J.A.

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21–25, 114–131, 138–139).[1] That craft included, among others, all REA employees previously represented by the Teamsters (J.A. 30–37). The Teamsters were notified immediately of the application, and about three weeks later their president interposed various objections to the application and urged its dismissal (J.A. 31, 33–34). The Railway Clerks replied to the Teamster's objections, and a mediator was assigned to investigate the dispute. The Teamsters requested a formal hearing on their objections, and the Board held the hearing in May 1965 (J.A. 35–39). On September 8, 1965, the Board rendered an extensive opinion, with findings and conclusions on the various issues involved. The Board concluded that a mediator should conduct an election for the single craft denominated by the Railway Clerks (J.A. 30–73).

On September 24, 1965, the Teamsters asked the Board to delay the representation election until at least 90 days after the date on which the unions received a list of the names and addresses of REA's employees (J.A. 142). On October 8, 1965, the Board denied that request for the reason that "Section 2, Ninth, Railway Labor Act [45 U.S.C. 152], requires prompt disposition of representation disputes" (J.A. 72–73), and advised both unions that the election would be conducted by mail ballots and that the ballots would be mailed to the employees about November 1, 1965, for return by December 1, 1965 (J.A. 189, 200). On October 15, 1965, the mediator, who had obtained a list of employees from REA, gave the unions the names and addresses of approximately 34,000 craft

[1] "J. A." refers to the Joint Appendix in the court of appeals, which is part of the record in this Court.

employees (J.A. 143, 159, 200). The Teamsters began mailing campaign material to these employees on October 19, 1965 (J.A. 153). On October 22 and 28, 1965, the mediator gave the unions additional lists of 900 and 1100 craft employees (J.A. 153–154, 161–162). The mediator began mailing ballots on October 31 (J.A. 154). The returned ballots were counted between December 1 and 5, 1965, with the following results (J.A. 176–177, 189):

Total eligible votes	85,560
Number of eligible votes cast	28,059
Votes for Railway Clerks	17,867
Votes for Teamsters	10,192
Number voting for another union	0
Number of void ballots	261

In accordance with those results, the Railway Clerks were certified by the Board as the craft's collective bargaining agent on December 10, 1965 (J.A. 181–183, 212).

This action was commenced by petitioner union and one of its members on October 13, 1965, to enjoin the Board from holding the election (J.A. 4–17). Prior to the mailing of ballots on October 31, 1965, the district court denied petitioners a preliminary injunction, and the court of appeals and Chief Justice Warren denied petitioners' applications to stay the election pending an appeal from the district court's denial (J.A. 187–188). In February 1966, the district court denied petitioners' motion for summary judgment setting aside the election and certification, and granted the motions for summary judgment filed by the Board and the intervening Railway Clerks (J.A. 109–110, 145–146, 207, 217). The court of appeals, recognizing "the well-established limitations upon judicial review

of employee representation proceedings conducted by the Board under the Railway Labor Act" (Pet. App. A 18), affirmed.

2. Petitioners urge that the Board unconstitutionally denied to the Teamsters and their supporters an effective opportunity to persuade REA's employees to choose the Teamsters rather than the Railway Clerks as their collective bargaining representative. Specifically, petitioners maintain that the Board was obliged to allow the Teamsters a longer period of time in which to disseminate campaign literature by mail (Pet. 12–14). However, as the court of appeals held, petitioners have not shown that the Board's conduct of the representation election infringed any constitutionally protected right. The Board in fact gave the Teamsters a substantial opportunity to campaign by various means, including the mails.

a. The Board in no way impeded the Teamsters in their efforts to communicate with REA's employees by mailing campaign literature to them, by making speeches, by picketing, or by visiting their homes. Under the Act, which, among other things, provides for the prompt resolution of representation disputes by election or "any other appropriate method," the Board's function is merely to ascertain a present fact: who are the employees' duly designated and authorized representatives. The Board issues no orders, has no enforcement functions, and, in general, cannot regulate a union's campaign tactics. See Section 2, Fourth and Ninth, 45 U.S.C. 152 (Pet. App. B 20–22); *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 304–305. Clearly the Board was not required, as petitioners in effect argue, to assist

the Teamsters' campaign efforts here by delaying the election. While petitioners urge that a more extended period for campaigning was desirable, Congress clearly did not think so since it provided in Section 2, Ninth, of the Railway Labor Act, as amended, that "within thirty days after the receipt of the invocation of its services," the Board should certify the designated representative. 45 U.S.C. 152 (Pet. App. B 21). That provision "places beyond reach the speed which the Act's framers thought an objective of the first order." *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 668.[2]

b. The Board determined on September 8, 1965, that a representation election would be held about November 1, 1965, more than seven weeks later. Thus, the Teamsters had ample time to campaign. The Teamsters could and did mail campaign literature to most of the employees involved. Although the Board is not required to furnish lists of the employees' names and addresses to the unions, it nevertheless does so by obtaining lists from the carriers. The Board obviously cannot insure the completeness or accuracy of such lists. On October 15, 1965, the mediator supplied the Teamsters with a list of 34,000 employees; on October 22 and 28 supplemental lists were furnished. Given the large numbers involved, some erroneous addresses were inevitable. Petitioners do not suggest that the errors reflected any hostility or bias on the

[2] We do not read the petition here as attacking the constitutionality of Section 2, Ninth's thirty day time requirement. In any event, given the public interest protected by the Act—the expeditious resolution of representation disputes—there can be no doubt as to that provision's constitutionality. Cf. *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 704–705.

part of the Board. In any event, the same lists were used by the Board in mailing the ballots. If, as petitioners claim (Pet. 13), the Teamsters had only two days to reach by mail 1100 employees, eight days so to reach 900 others, and no chance (because of erroneous addresses) to reach 1200 others, these infirmities were mathematically insufficient to have altered the outcome of the election, even on the unlikely supposition that all of the employees voted for the Railway Clerks but would have been converted to the Teamsters. Cf. *Overnite Transportation Company* v. *N.L.R.B.*, 327 F. 2d 36, 41 (C.A. 4). In these circumstances, the Board certainly did not abuse its discretion, let alone infringe any constitutionally protected rights, by ordering the election to begin on October 31, 1965, in order to comply as closely as possible with the thirty day provision of Section 2, Ninth, of the Act. See *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 667–668.

There is, we submit, no occasion for further review of the Board's proceedings by this Court. The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

OCTOBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966